(1)

Supreme Court, U.S.
FILED

962020 JAN 17 1997

OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT
FOR THE UNITED STATES OF AMERICA

October Term, 1997

CLIFFORD LEON HOUSTON,

Petitioner,

v.

CONRAD FINNELL; JOHN DUFFY; GARY HUMPHRIES; DALE BROWN; BRYAN MULLINS; TONY GWINN; JIMMY WASHAM; RANDY SCARBROUGH,

Respondents.

Petition For A Writ of Certiorari
To The United States Court Of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Clifford Leon Houston
412 Barnard Narrow Road
Ten Mile, Tennessee 37880
(423) 376-7839
Petitioner - Pro Se

42 pp

QUESTIONS PRESENTED

I. Whether attorney Conrad Finnell properly advised Petitioner of his Constitutional rights to an appeal and other legal options.

II. Whether attorney Conrad Finnell acted effectively as counsel for the Petitioner when false and/or misleading testimony and evidence was allowed to be introduced to the jury trial phase. (marijuana evidence).

III. Whether attorney Conrad Finnell effectively represented Petitioner by not objecting to the introduction of false evidence and testimony (marijuana) which Mr. Finnell brought to the trial court's attention and then allowed it to be introduced by an agreed order.

IV. Whether attorney Conrad Finnell acted effectively and in petitioner's best interests when he told Petitioner he would counter the entry of the introduction of the alleged evidence (marijuana) at the initial trial of this action.

V. Whether attorney Conrad Finnell acted effectively when he abandoned Petitioner without explaining all options available in this action and whether Mr. Finnell advised Petitioner of his Constitutional due process rights which Mr. Finnell was hired to protect.

VI. Whether the Kingston Police Officers and attorney John Duffy allowed false and misleading testimony and evidence to be introduced to the jury when they knew the same to be false and misleading.

VII. Whether the lower courts acted properly by statute of limitation regarding the due process violation and when Petitioner was not advised of all his legal options when counsel discharged his duties.

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No. _____

In The

SUPREME COURT of the UNITED STATES

October Term, 1997

CLIFFORD LEON HOUSTON

Petitioner,

v.

CONRAD FINNELL; JOHN DUFFY; GARY HUMPHRIES; DALE BROWN; BRYAN MULLINS; TONY GWINN; JIMMY WASHAM; RANDY SCARBROUGH,

Respondents.

Petition For A Writ Of Certiorari
To The United States Sixth Circuit
Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Petitioner, Clifford Leon Houston, respectfully prays that a writ of certiorari issue to review the judgment and opinion from the United States District Court for the Eastern District of Tennessee, entered January 4, 1996, and the Order of the United States Court of Appeals for the Sixth Circuit affirming the district court's dismissal of petitioner's complaint for failing to state a claim.

JURISDICTION

The judgment and opinion of the United States District Court for the Eastern District was entered on January 4, 1996. The Order from the United States Court of Appeals for the Sixth Circuit was entered on October 29, 1996. Petitioner would respectfully submit that this Petition for Writ of Certiorari is timely filed within the ninety day time period permitted by Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and Warrants shall not issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner brought this pro se action pursuant to 42 U.S.C. § 1983. In particular, petitioner contends that his civil rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution have been violated by the respondents and thus, petitioner is entitled to damages. Petitioner contends that the respondents conspired with each other which adversely affected the outcome of the civil rights trial in which petitioner and another individual had sued the City of Kingston, Tennessee, the Kingston Police Department, and certain individual police officers, including Police Chief Gary Humphries. Petitioner contends that some of the respondents conspired to commit perjury and manufactured certain evidence - a Crown Royal bag containing marijuana - into his civil rights trial.

ARGUMENTS

Petitioner submits that respondents filed a Pretrial Order showing that neither of the Plaintiffs in the original cause of action were charged with or in possession of drugs. (See Exhibit A). Petitioner will show this Honorable Court that there was no indictment in the original cause of action as to criminal charges. (See Exhibits B and B-1). In addition, petitioner submits a letter from respondent Conrad Finnell to Petitioner regarding no evidence of any wrongdoing on the part of the Plaintiffs. (See Exhibit B-2). Dennis Humphries, the Attorney General for Roane County, Tennessee stated to Petitioner that he never received any evidence (marijuana) during the prosecution of Petitioner's case, therefore, Attorney General Humphries did not seek an indictment for possession of drugs.

Petitioner can show this Honorable Court that Mr. Finnell did not counter the introduction of the alleged evidence in this cause and allowed the alleged evidence and testimony to be admitted and introduced to the jury by signing an Agreed Order. (See Exhibit C). Mr. Finnell told Petitioner that the alleged evidence was green and fresh and thus, could not have been the evidence seized at petitioner's residence because three (3) years had elapsed. Officer Dale Brown, of the Kingston City Police Department, testified at trial that he had kept this evidence in his safe at his personal residence for over a year. Mr. Brown did not offer an explanation as to why he had kept the evidence at his home instead of an evidence room at the police department. Mr. Finnell never objected to the alleged evidence or the testimony surrounding the evidence. Nor was there a contemporaneous objection made for the purpose of an appeal in this matter.

Petitioner further submits to this Honorable Court that attorney John Duffy and the other respondents came to the United States Federal District Court for the Eastern District of Tennessee and produced the alleged evidence (a bag of marijuana) that was in no way related to the prosecution of the Plaintiffs and used a chain of

custody to show it was taken from the Plaintiffs' residence when the Attorney General had no knowledge of this alleged evidence and did not seek an indictment for possession of drugs. If the Attorney General never possessed the alleged evidence for indictment, a chain of custody cannot be established. (See Exhibit D).

Petitioner submits that the above stated reasons demonstrate conspiracy for the purpose of depriving petitioner, either directly or indirectly, equal protection of the laws or of equal privileges and immunities under the laws as a United States citizen. Volunteer Medical Clinic, Inc., v. Operation Rescue, 948 F.2d 218.

In the Sixth Circuit, a finding of an agreement to accomplish a wrongful purpose is required in order to find a conspiracy.... Ockerman v. May Zima & Co., 785 F. Supp. 695, remanded 27 F.3d 1151.

Additionally, petitioner submits that the statute of limitations did not begin to run until he became aware of this wrongful act on July 6, 1995. (See Exhibit B-1). Petitioner was told by Attorney General Humphries that Mr. Humphries had never been given the alleged evidence during the Plaintiffs' prosecution. Therefore, Petitioner submits that the actual injury occurred on July 6, 1995 when he obtained a certified copy of the Stipulation of Release of Exhibits. (Exhibit C). This action is within the statute of limitations. In Briley v. California, 564 F.2d 849, federal law determines when the statute begins to run under 42 U.S.C. § 1983. The established rule is that where the plaintiff has been injured by fraud or concealment and remains in ignorance of it without fault or want of diligence on his part, the statutory period does not begin to run until discovery of the injury. In the instant case, petitioner will show that he diligently sought the truth. Petitioner was left to think he had overlooked something in his criminal dismissal. It was petitioner's understanding that Mr. Finnell had not fully informed petitioner of all legal options available. Petitioner submits the true dates regarding the falsified evidence and testimony to this Honorable Court. The statute of limitations did not begin to run until the attorney's negligence had

resulted in injury to the petitioner. There was no proof of such injury at the time petitioner was notified of the Agreed Order. See, National Mtg. Co. v. Washington, 744 S.W.2d 574 (Tenn. Ct. App. 1987). A right of action will not accrue to start the running of the statute of limitations, until there is a person or persons capable of suing or being sued. This action is within the statute of limitations. Generally speaking, time begins to run under such statutes when, and only when, the cause or right of action has accrued or arisen. The statute of limitations begins to run immediately upon the accrual of the cause of action. Petitioner contends that this lawsuit was filed on November 20, 1995 because Mr. Finnell suppressed this action by not releasing the petitioner's file or records; thus, still presenting himself as the attorney of record.

The Court of Appeals relied on three federal cases that held or indicated or mandated that a malpractice plaintiff under the federal Act must know the legal implications of the facts, as well as the facts themselves, before the limitations period will begin to run. See, Exnicious v. United States, 563 F.2d 418 (CA10 1977); Bridgford v. United States, 550 F.2d 978 (CA4 1977); and Jordan v. United States, 503 F.2d 620 (CA6 1974).

Although petitioner received a jury verdict and damages in the amount of $150.00, it is petitioner's contention that had the alleged evidence not been admitted, the jury would have viewed petitioner's case in a more favorable light and would have increased his original damages award.

CONCLUSION

Petitioner respectfully requests this Court to grant the Petition for Writ of Certiorari, reverse the Tennessee Appellate Court Order, and direct this case back to the District Court for a new hearing. For the foregoing reasons stated above, petitioner requests that this cause of action be directed back to the District Court for a hearing on the statute of limitations.

Respectfully submitted,

CLIFFORD LEON HOUSTON
412 Barnard Narrow Road
Ten Mile, Tennessee 37880
(423) 376-7839
Petitioner - Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

CLIFFORD LEON HOUSTON	)	
Plaintiff	)	
v.	)	No. 3:95-cv-645
KINGSTON, TENNESSEE, et al.,	)	
Defendants	)	

MEMORANDUM OPINION

The pro se plaintiff brings this action pursuant to 42 U.S.C. // 1983. In particular, plaintiff claims that his civil rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution have been violated by these defendants, and that he is therefore entitled to $10 million in compensatory damages and $10 million in punitive damages. Essentially, the basis for plaintiff's claim is that the defendants conspired with each other to adversely affect the outcome of the trial of a civil rights action in which plaintiff and another individual had sued the City of Kingston, Tennessee, its police department, and certain of its police officers, including its police chief, Gary Humphreys. Among plaintiff's more specific allegations are that some of the defendants conspired to commit perjury and to introduce certain evidence -- a Crown Royal bag containing marijuana -- into his civil rights trail, which was heard by the Honorable Thomas G. Hull, a United States judge of this District. This matter is presently before the court on the motion to

dismiss [Doc. 2] filed by Judge Hull, who is also proceeding pro se in this matter. Plaintiff has failed to timely respond to this motion, see LR 7.1(a), E.D.TN., and is therefore deemed to have waived any response thereto. See LR 7.2, E.D.TN. For the reasons that follow, Judge Hull's motion will be granted, and this case will be dismissed.[1]

In his motion, Judge Hull first contends plaintiff's # 1983 action is barred by the applicable one-year statute of limitations. The court agrees. With respect to actions brought pursuant to # 1983, the law is well settled that federal courts must refer to state statutes and state law to determine the statute of limitations and any applicable tolling rules. Board of Regents, Etc., v. Tomanio, 446 U.S. 478, 484-85, 100 S.Ct. 1790, 1794-95, L.Ed.2d 440 (1980). Tennessee law sets a one-year statute of limitations for violations of # 1983. See Tenn. Code Ann. # 28-3-104(a)(Supp. 1995).[2] See also Redd v.

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[1] The court also notes for the record that defendants City of Kingston, Tennessee, Roane County Sheriff's Department, Randy Scarbrough, Gary Humphreys, Dale Brown, Bryan Mullins, Tony Gwinn, Jimmy Washam, John C. Duffy, and the law office of Watson, Hollow & Reeves, field a motion to dismiss on December 18, 1995 [see Doc. 23]. Likewise, defendants Conrad Finnell, P.C., and Associates, and Conrad Finnell, Individually, filed a motion to dismiss on January 2, 1996 [see Doc. 26]. Obviously, the time for plaintiff to respond to these two motions to dismiss has not yet expired. See LR 7.1(a), E.D.TN. Nevertheless, these motions will be denied as moot, in view of the fact that Judge Hull's motion will be granted based on plaintiff's failure to file within the applicable statute of limitations period, which is one of the very same grounds upon which all other defendants base their pending motions to dismiss.

[2] 28-3-104. **Personal tort actions.** - (a) The following actions shall be commenced within one (1) year after the cause of action accrued:

Giless, 857 F. Supp. 601, 605 (W.D. Tenn. 1994)("the time limit for filing a section 1983 action is not set by this court, but is determined by statute.").

Here, plaintiff contends that the defendants conspired to violate his civil rights during the trial of a civil rights action which occurred December 8 and 9, 1993. The last alleged overt act in the purported conspiracy was the authorization by the Honorable Thomas W. Phillips, a United States magistrate judge of this District, for the release of contraband to the law enforcement agency which introduced it at trial.[3] This act also occurred on December 9, 1993. This action was not filed until November 20, 1995, nearly two years after plaintiff's cause of action accrued. Thus, the complaint indicates on its face that it is barred by the applicable one-year statute of limitations. Judge Hull's motion must therefore be granted.

Order accordingly, January 4, 1996

/s/ JAMES H. JARVIS
UNITED STATES DISTRICT JUDGE

---

(3) civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes;

3 Judge Phillips is also named as a defendant in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

CLIFFORD LEON HOUSTON	)	
Plaintiff	)	
v.	)	No. 3:95-cv-645
KINGSTON, TENNESSEE, et al.,	)	
Defendants	)	

ORDER

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, it is hereby ORDERED that the motion to dismiss [Doc. 2] filed by the Honorable Thomas G. Hull, United States District Judge, be, and the same hereby is, GRANTED whereby this case is DISMISSED WITH PREJUDICE as to all defendants. See Rule 12(b)(6), Federal Rules of Civil Procedure. It is further ORDERED that the following motions be, and the same hereby are, DENIED AS MOOT:

(1) Motion to dismiss [Doc. 23] filed by defendants City of Kingston, Tennessee, Roane County Sheriff's Department, Randy Scarbrough, Gary

Humphreys, Dale Brown, Bryan Mullins, Tony Gwinn, Jimmy Washam, John C. Duffy, and the law office of Watson, Hollow & Reeves; and

(2) Motion to dismiss [Doc. 26] filed by defendants Conrad Finnell, P.C. & Associates, and Conrad Finnell, individually.

ENTER: January 4, 1996

/s/ JAMES H. JARVIS
UNITED STATES DISTRICT JUDGE

No. 96-5201

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLIFFORD L. HOUSTON,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
KINGSTON, TENNESSEE; ROANE COUNTY SHERIFF'S DEPARTMENT; KINGSTON POLICE DEPARTMENT; RANDY SCARBROUGH, individually and in his official capacity as investigator at the Roane County Sheriff's Department; GARY HUMPHREYS, individually and in his official capacity as Chief of the City of Kingston Police Department; DALE BROWN, individually and in his official capacity; BRYAN MULLINS, individually and in his official capacity; TONY GWINN, individually and in his official capacity; JIMMY WASHAM, individually and in his official capacity; THOMAS G. HULL, individually and in his official capacity; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS; JANET RENO, in her official capacity; KARL K. KIRKPATRICK, in his official capacity; CONRAD FINNELL, P.C. and Associates; JOHN C. DUFFY, individually and	)	O R D E R

in his official capacity; Law Office of)
WATSON, HOLLOW & REEVES;)
LOUIS FREEH, Director of the)
Federal Bureau of Investigation,)
in his official capacity; BING)
BRIDGES, individually and in his)
official capacity; HARRY FRANZ,)
individually and in his official)
capacity; THOMAS W. PHILLIPS,)
individually and in his official)
capacity,)
)
Defendants-Appellees.)

Before: MARTIN, Chief Judge; WELLFORD and MOORE, Circuit Judges.

Clifford L. Houston, proceeding pro se, appeals a district court order granting the defendants' motion to dismiss his complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Bringing this suit under 42 U.S.C. # 1983, Houston sued the City of Kingston, Tennessee, several municipal employees, and several federal defendants, including Janet Reno and the Director of the FBI. Houston sued some of the defendants in their individual and official capacities, and some only in their official capacities.

Specifically, Houston alleged that these defendants violated his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, and also violated state law, when they conspired to commit perjury and to introduce fabricated evidence into his civil rights trial that took place in December 1993.

After considering defendant Hull's motion to dismiss under Rule 12(b)(6), the district court determined that motion should be granted, because the action was barred by the applicable one-year statute of limitations set forth in Tenn. Code Ann. # 28-3-104(a) (Supp. 1995). On appeal, Houston argues that his complaint is not barred because the statute of limitations should be measured from July 6, 1995, rather than from December of 1993.

While the district court did not expressly dispose of Houston's supplemental state law claims, dismissal of these claims was implicit within the court's judgment. Ford Motor Co. v. Transport Indem. Co., 795 F.2d 538, 543 (6th Cir. 1986). However, Houston has abandoned his state law claims, on appeal. Boyd v. Ford Motor Co., 948 F.2d 283, 284 (6th Cir. 1991), cert. denied, 503 U.S. 939 (1992).

The district court properly dismissed this suit pursuant to Fed. R. Civ. P. 12(b)(6) because, even when Houston's complaint is construed in a light most favorable to the plaintiff and even when Houston's factual allegations are accepted as true, Houston undoubtedly can prove no set of facts in support of his claim that would entitle him to relief. LRL Properties v. Portage Metro Hou. Auth., 55 F.3d 1097, 1103 (6th Cir. 1995). Houston's compliant is clearly barred, for the reasons stated by the district court. Sevier v. Turner, 742, F.2d 262, 272 (6th Cir. 1984). Houston's cause of action accrued at the time of the trial in December of 1993, when Houston knew or had reason to know of the injury that is the basis of his action. Friedman v. Estate of Presser, 929 F.2d 1151, 1159 (6th Cir. 1991). The one-year statute of limitations also applies to Houston's claims that were filed against the federal defendants pursuant to Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390-97 (1971). See Butz v. Economou, 438 U.S. 478, 503-04 (1978); McSurely v. Hutchison, 823 F.2d 1002, 1005 (6th Cir. 1987), cert. denied, 485 U.S. 934 (1988).

Accordingly, the district court's order dismissing this complaint for failure to state a claim is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT: October 29, 1996

/s/ LEONARD GREEN, JR.
CLERK

APP 10

Office of
ANGELA RANDOLPH
Circuit & Criminal Court Clerk
Roane County
P.O. Box 73
Kingston, Tennessee 37763

Hon. Russell E. Simmons, Jr.
Circuit Judge

Hon E. Eugene Eblen
Criminal Judge

October 13, 1995

TO WHOM IT MAY CONCERN:

I have checked our Grand Jury docket from June 1990 through June 1992 and did not find any cases against Clifford Leon Houston. I also checked our computer from 1991 to present and found no cases on Mr. Houston.

If I can be of further assistance, please feel free to contact me at (423)376-2390.

Yours truly,

/s/

Barbara Scalf, Chief Deputy

13 November 95
Angela Randolph
Holly Hamm

Exhibits B
Exhibit B-1

APP 11

Law Offices
CONRAD FINNELL, P.C. AND ASSOCIATES
P.O. Box 1476
217 Broad Street, NW
CLEVELAND, TENNESSEE 37364-1476
(615) 472-3391
(615) 472-0961 (OFFICE NIGHT)
FACSIMILE NUMBER (615) 479-5597

LAWRENCE H. PUCKETT
ASSOCIATE COUNSEL

OF COUNSEL
BILL B. MOSS

OF COUNSEL
ALVIN Y. BELL
SUITE 1217, FIRST TENNESSEE BANK BLDG.
CHATTANOOGA, TENNESSEE 37402
(615) 266-6461

RALPH HARWELL
2131 PLAZA TOWER
KNOXVILLE, TENNESSEE 37929
(615) 637-8900

April 7, 1993

John C. Duffy
WATSON, HOLLOW & REEVES
P.O. Box 131
Knoxville, TN 37901-0131

RE: Houston vs. City of Kingston, et al.
U.S.D.C. #3-91-402

Dear John:

Please find enclosed two agreed orders which you sent to me which I have approved together with a proposed agreed order amending the complaint and also supplementing the original pretrial order. I trust that you will see that all of these three agreed orders are properly entered.

Very truly yours,
/s/ CONRAD FINNELL

CF/mje
Enclosures (Pleadings)
c: Leon Houston
Conley Brown
Dictated but not read.

Law Offices
CONRAD FINNELL, P.C. AND ASSOCIATES
P.O. Box 1476
217 Broad Street, NW
CLEVELAND, TENNESSEE 37364-1476
(615) 472-3391
(615) 472-0961 (OFFICE NIGHT)
FACSIMILE NUMBER (615) 479-5597

LAWRENCE H. PUCKETT
ASSOCIATE COUNSEL

OF COUNSEL
BILL B. MOSS

OF COUNSEL
ALVIN Y. BELL
SUITE 1217, FIRST TENNESSEE BANK BLDG.
CHATTANOOGA, TENNESSEE 37402
(615) 266-6461

RALPH HARWELL
2131 PLAZA TOWER
KNOXVILLE, TENNESSEE 37929
(615) 637-8900

November 19, 1993

Leon Houston
Route 2, Box 179
Ten Mile, TN 37880

Conley Brown
Route 1, Box 179
Kingston, TN 37763

Dear Leon and Conley:

I had a long talk with Attorney John Duffy and he has told me some things about his insurance coverage in this case that I need to discuss with you.

First of all, he says there is no liability insurance coverage for any award of punitive (as distinguished from compensatory) damages. He also tells me that if the jury finds a verdict based on "outrageous conduct" that this will void any insurance coverage in the case for all damages.

I do not really think we need a punitive damages claim or an outrageous conduct claim in this case when we go to the jury. We still have the false arrest, false imprisonment, malicious prosecution, illegal seizure, and excessive force claims for the jury to decide. For this reason, I do not really feel that we have to have the punitive damages and the outrageous conduct claim submitted to the jury in order to receive what the jury would otherwise award in damages in this case. In other words, I think the jury will award the same damages regardless of what legal theories are presented to them.

I just wanted to tell you this possible coverage question and I want you to give me complete liberty in the course of this trial to dismiss the outrageous and punitive damages claims if I feel that at the close of all the proof that it would be unwise on our part to have those particular issues submitted to the jury because of the insurance coverage questions.

We listened to this tape again and got one of the recording studios to get us a clear audible tape. Mr. Lynn definitely says that Brian Mullins was there. Now we are having trouble finding Mr. Lynn to serve with a witness subpoena. Any help that you can give David Potect in locating this witness would be greatly appreciated. I want to talk to him personally before trial if possible.

Now let me talk to you confidentially for a moment about your court appearance and the dress that you should wear.

First of all, it would be better if you had your hair trimmed and cut short, all mustaches and beards shaved away, and that you wear, during each day of the trial solid color shirt (preferably light blue or light tan; and very conservative slacks. I don't want you in blue jeans, boots, wearing any jewelry or appearing flashy in any way whatsoever. A simple solid color button-down long sleeve shirt and some very conservative trousers (no bright greens, pinks, reds, blacks, etc.).

Exhibit B-2

Preferably, you need to get some light tan or light gray or dark blue trousers. You should plan on having clothes for three days of court. In other words, I want you need and trim and dressed very conservatively. If you have any questions about this, we can discuss it more in detail.

This jury that tries your case will not know you from Adam and thus your personal appearance in the courtroom is very important in attempting to create a favorable impression with the jury.

I will be back in touch with you as the trial date approaches.

Very truly yours,

/s/

CONRAD FINNELL

CF/mje

Dictated but not read.

...friends and relatives to their apartment to socialize, cook steaks, and drink some beer. Plaintiff Brown secured a carton of cokes, a carton of beer, and some potato chips, and Plaintiff Houston secured a charcoal grill, some steaks, and other items. The gathering began some time before dark and four (4) guests along with the two plaintiffs were cooking steaks on an outside grill on the balcony of the apartment when Defendants Washam and Gwinn, police officers of the City of Kingston (apparently in response to a disturbance call) arrived at the apartment. After the two Defendants told the Plaintiffs and their guests to turn down the music and put out the charcoal fire this visit by the police officers passed without incident and the two officers left the scene. A short time later the party broke up and Plaintiff Brown went to the back bedroom and fell asleep on a mattress which was on the floor, and Plaintiff Houston fully clothed went to sleep on the couch in the living room with a firearm in his belt. Houston says that he kept a firearm within reach at all times since the traumatic fire bombing of a family home several years before. Houston had suffered a minor accident earlier in the evening; there was some dried blood on his left cheek and apparently a small knife, used to cut the steak earlier and then left nearby somewhere in the living room. There is one entrance to this apartment, only a wooden entrance door on the front balcony with a wide sliding glass door immediately adjacent.

At this point, certain very material facts are not in dispute. When all four of the Defendants (along with ambulance attendants and police officers from other agencies) arrived back at the apartment sometime around or shortly after midnight, both of the Plaintiffs were sound asleep; Houston on the couch and Brown in the back bedroom. The Defendants were acting without an arrest warrant or a search warrant.

Apparently the officers claimed that they could see Houston on the couch with the blood on his cheekbone and the weapon in his belt from a vantage point on the balcony outside the apartment.

When the Officers entered the apartment, Houston was awakened first and was told he was under arrest for public drunkenness and carrying a weapon. When he verbally protested his arrest without a

warrant, he says that he was handcuffed behind his back and told to get down on his knees. When he told the officers that he had not done anything to get down on his knees for, Houston claims that he was struck with billy sticks on the back of his legs and on his elbows. Houston will testify that the officers kept insisting that he tell them where the drugs were, and that he, Houston, kept telling them there were no drugs in the apartment. Houston will further say that the Defendant Mullins held a gun to his head and threatened him if he did not tell him where the drugs were.

Brown was awakened next, and he says he was aroused from a deep sleep (perhaps partially alcohol induced) and that he had become sick after lying down in his back bedroom. He, too, verbally protested this warrantless intrusion into the privacy of his bedroom, and he will testify that one of the Defendants rammed his arm up behind his back with such force that it caused permanent injury to his shoulder joint. There will be medical proof to substantiate this claim. Brown also says that he was threatened and physically abused by these officers while they were insisting that he tell them where the drugs were.

Both Plaintiffs will testify that they had no drugs in their apartment or in Brown's car outside in the parking lot and that they repeatedly told the officers that there were no drugs there to their knowledge.

In any event, after a while, both Plaintiffs Brown and Houston were handcuffed behind their back by the Defendants and taken downstairs to waiting patrol cars. Plaintiff Houston will claim that his trousers were undone and that he was partly naked in full view of several onlookers as he was being transported to the patrol car.

Both plaintiffs will testify that they were locked up in the drunk tank at the Roane County Jail by the Defendants while still handcuffed, and Plaintiff Houston (somewhat corroborated by one of the Defendants) says that he was struck forcibly and savagely about the head by another prisoner in the drunk tank while he was handcuffed and helpless to defend himself.

While Plaintiffs were in custody, Defendant Brown secured a drug dog and later, without benefit of any legal process or search warrant, seized Plaintiff Brown's automobile from the apartment parking lot and had it towed to a garage in Kingston.

Plaintiffs secured the services of Attorney Cooley of Rockwood to represent them after Brown had unsuccessfully tried to retrieve his car after he was released from custody on the morning of July 21st. Plaintiff Brown was told by Defendant Brown that he could get his car back by paying $250.00 into the drug fund, an offer which Brown refused.

After some delay and several court appearances and with the assistance of their attorney, the State dropped all criminal charges against Houston and Brown growing out of this incident without ever going through a probable cause hearing. Brown's automobile was eventually returned to him without charge and Houston's gun was likewise returned to him, all prior to the filing of this civil rights suit.

PLAINTIFFS' BRIEF

Unlawful Arrest

It is abundantly clear that both Plaintiffs were quietly asleep at their place of residence when the Officers arrived and thus neither could be guilty of the offense of public intoxication.

The offense of public intoxication is defined in T.C.A. 39-17-310 as follows:

> 39-17-310. Public intoxication. -- (a) A person commits the offense of public intoxication who appears in a public place under the influence of a controlled substance or any other intoxicating substances to the degree that:
> (1) The offender may be endangered;
> (2) There is endangerment to the persons

> or property; or
> (3) The offender unreasonably annoys people in the vicinity.
> (b) A violation of this section is a Class c misdemeanor. (emphasis supplied).

The law is equally well settled that even if there had been a disturbance sometime earlier in the evening, this would not provide the basis for a legal arrest by these Defendants on a misdemeanor charge.

> ... However, an officer's power to arrest without warrant for a misdemeanor committed in his presence does not extend to past offenses. Thus, an officer cannot arrest without warrant for a breach of peace that has been fully consummated..." 5 Am . :2d 724, §33, citing numerous cases.

By the same token, Plaintiff Houston was not committing any criminal offense when he possessed a firearm inside his place of residence.

The Second Amendment of the United States Constitution and Article One, Section 26 of the Tennessee Constitution guarantees to the Plaintiff the right to keep and bear arms. There is no claim here that Plaintiff Houston was a convicted felon and/or that the weapon possessed by him was otherwise illegal. The Tennessee statutes relating to the ownership and possession of firearms are set forth in T.C.A. 39-17-1301 thru 1318, and Plaintiff Houston was not violating any of these code sections at the time of his arrest.

It thus follows that the arrest of both Plaintiffs on a charge of public drunkenness was unlawful and violated rights protected by the Fourth Amendment of the United States Constitution. Likewise, the arrest of Houston on the weapons charge was also patently illegal. The

right of a citizen to possess an otherwise legal loaded weapon at his place of residence is so fundamental and so well established that it is difficult to find any case citation on point.

Assuming that the proof will be undisputed that both Plaintiffs were asleep at the time the officers entered their apartment, and assuming further that the officers were not possessed of a valid arrest and/or search warrant, the only possible way the Defendants in this case could justify the warrantless entry into the Plaintiffs' private living quarters would be upon a claim that they honestly believed that Plaintiff Houston was in need of immediate emergency treatment. Upon learning that neither Plaintiff needed, requested, or required medical care, and upon being confronted by objections of the Plaintiffs as to the intrusion into their private quarters, the "reasonableness" provision of the Fourth Amendment required that the Defendants should have immediately withdrawn from the premises. The conclusion that no medical attention was required or needed by either Plaintiff is best evidenced by the undisputed fact that no medical attention was ever provided by ambulance personnel on the scene, and by the further uncontradicted evidence that both Plaintiffs were taken directly to jail and incarcerated without medical care.

Although the facts of Chimel v. California, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034, are clearly distinguishable from the present case, it is respectfully submitted that the rationale of the case is relevant and analogous to the case at bar, and some of the language of other cases cited by our Supreme Court in Chimel is directly on point.

In Chimel, unlike the case at bar, the Officers had entered the accused residence by virtue of a valid arrest warrant, but were not in the possession of a valid search warrant for the premises. A warrantless search of desk drawers and other places outside the immediate control of the accused yielded evidence of stolen property later used to convict the homeowner of a crime. In holding this warrantless seizure unreasonable and in violation of the Fourth Amendment, the Court, quoting with approval from prior cases, among other things, said:

> It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable...This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities...To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.

Chimel v. California, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034.

The following language used by the Court supports Plaintiffs' contention that these officers should have withdrawn immediately upon learning that neither of the Plaintiffs needed or requested medical attention.

> Only last term in Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1858, we emphasized that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure," and that "the scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.

Chimel, Supra, 395 U.S. at 762.

The only possible legal reason that these officers had for entering this apartment was to determine if Plaintiff Houston required prompt medical care. Once it was clearly determined that no such treatment was required or needed, the law would require that the Defendants withdraw without further arrest, mistreatment, or imprisonment of the Plaintiffs. Any conduct of the Defendants inside the Plaintiffs' living quarters after the Officers determined that Houston was not in need of medical treatment should be regarded as unlawful.

Warrantless Seizure of Brown's Automobile

It is respectfully submitted that there is absolutely no legal basis for the warrantless seizure of Brown's automobile. There is no evidence that the Officers had legal reason to believe that this vehicle had ever been used to facilitate a drug transaction. The search and seizure of this vehicle was certainly not incident to any lawful arrest contemporaneous in time and place with said arrest. There is no claim than any contraband or illegal substance was in plain view. In short, there is simply no legal theory upon which to justify the warrantless seizure of Mr. Brown's automobile and said seizure constitutes a classic Fourth Amendment violation.

Summary

The fact that the Officers summoned a "drug sniffing dog" to the scene of the arrest indicates more clearly than anything else the real motive of these Officers in entering the Plaintiffs' apartment without a warrant and arresting the Plaintiffs. The Officers were acting on mere suspicion that there was marijuana or other drugs either in the apartment or in Brown's car. Their threats and the physical abuse of the Plaintiffs while demanding that the Plaintiffs reveal the location of the supposed illegal drugs provides another clear indication that the officers were acting on mere suspicion.

Plaintiffs have always denied any knowledge of any marijuana or other drugs either in their apartment or in Brown's vehicle and to this

date neither the Plaintiffs nor their counsel have been provided any physical evidence to the contrary.

The Defendants will in all probability, by hindsight, try to justify their conduct based upon a claim that the Plaintiffs or their guests stole or borrowed some patio chairs from outside the apartment building. At this point, the evidence relating to these patio chairs is very unclear and confusing. It is not clear as to whether some of Plaintiffs' guests temporarily borrowed these chairs believing the chairs belonged to the apartment house, whether permission was obtained for the use of the chairs, where the chairs were located, and exactly what the situation was in reference to the chairs.

T.C.A. 39-14-103 states:

> 39-14-103. Theft of services. -- A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent.

In Tennessee, the theft of property valued at $500.00 or less is a misdemeanor. T.C.A. 39-14-105.

Even if it could be argued that the temporary borrowing of the chairs under the circumstances constituted a theft in violation of T.C.A. 39-14-103, this conduct did not occur in the presence of the Defendants to justify an arrest based upon a misdemeanor committed in their presence. The evidence is also not clear as to what role, if any, the Plaintiffs played in reference to the patio chairs in that both Plaintiffs deny that they ever stole, borrowed or participated in taking or borrowing the patio chairs.

In any event, it would clearly appear from the conduct of the Defendants during the course of and after the arrest of the Plaintiffs that the patio chairs really had nothing to do with the Plaintiffs' arrest,

mistreatment, or the search and/or seizure of Plaintiffs' property. It is obvious that the Defendants suspected the Plaintiffs had illegal marijuana in their apartment or in Plaintiff Brown's car. There is no other reasonable explanation as to why the Defendants would have threatened and physically abused the Plaintiffs and/or why the Defendants summoned a "drug sniffing dog" to the scene.

The reasonableness requirements of the Fourth Amendment would mandate that these Defendants back off the minute they were aware that neither Plaintiff was in need of medical attention. The Defendants realized that they did not have an arrest warrant nor did they have a search warrant. Defendants also knew the Plaintiffs could not be guilty of public intoxication when both Plaintiffs had to be awakened from sleep inside their own residence. Defendants also knew that Plaintiff Houston enjoyed a very basic Second Amendment right to possess an otherwise legal weapon inside his place of residence. Yet, with all this knowledge, the Defendants continued to arrest, imprison, search, seize and prosecute the Plaintiffs, knowing the gross illegality of their conduct.

For all of these reasons,. Plaintiffs respectfully submit that their arrest, imprisonment, prosecution, and the seizure of their property constituted a violation of their civil rights as a matter of law. Plaintiffs therefore respectfully ask the Court to grant the requested preemptory instructions.

It is the Plaintiffs' theory that the Defendants acted together and in concert in effecting their arrest, imprisonment, and prosecution and that the Defendants are thus jointly and severally liable for any damages.

Contemporaneous with the filing of this Brief, Plaintiffs, through counsel, without waiving their request for preemptory instructions, have filed Suggested Issues to be Submitted to the Jury." Should the Court see fit to grant all or part of Plaintiffs' preemptory instructions, some of these issues would become moot.

Defense counsel may maintain that there are other issues in this

case including whether Defendant Brown acted independently and separate in reference to the seizure of Plaintiff Brown's vehicle. Defendant Mullins claims that he was not present and did not participate in any way of the arrest, imprisonment, or prosecution of the Plaintiffs. Defense counsel will no doubt submit what he deems to be appropriate issues relating to these claims.

Respectfully submitted,

/s/
CONRAD FINNELL
Attorney for Plaintiffs
P.O. Box 1476
Cleveland, TN 37364-1476
615/472-3391

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this pleading has been furnished to the person/s whose name/s and addresses are listed below by depositing a copy of the same in the US mail with sufficient postage attached thereto to carry the same to its destination, or by hand delivery.

This 29th day of November, 1993.

/s/
CONRAD FINNELL, Attorney

cc: JOHN C. DUFFY
WATSON, HOLLOW & REEVES
Plaza Tower, Suite 2100
P.O. Box 131
Knoxville, TN 37901-0131

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Clifford Houston, et al.,	)	
	)	Filed Dec23 4:51PM '93
Plaintiffs,	)	
v.	)	No. Civ. 3-91-402
	)	
City of Kingston, Tennessee, et al.,	)	
	)	
Defendants.	)	

STIPULATION FOR RELEASE OF EXHIBITS

It is hereby stipulated by and between the parties, through their respective attorneys, that the following exhibits be released to the care, custody, and control of Dale Brown/John Duffy until final judgment is entered, or time for appeal or motion for new trial has passed.

It is further stipulated that Dale Brown/John Duffy be designated as custodian of the below-described exhibits and that upon request of the Clerk of this Court said exhibits shall be delivered to the Clerk forthwith.

No.	Description
0-7	Crown Royal Bag w/drugs
0-8	Ash tray w/drugs
___	_____
___	_____

AGREED:

/s/ CONRAD FINNELL
Attorney for plaintiff

/s/ JOHN DUFFY
Attorney for defendant

IT IS SO ORDERED.

/s/ Thomas W. Phillips, U.S.M.J. 12/9/1993
United States District Judge (or magistrate)

ATTEST A True Copy
Certified this 7/6/95
R. Murry Hawkins, Clerk
by C. Sayles Dep. Clerk

EXHIBIT REL

Exhibit-C

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Petition for Writ of Certiorari to the United States Sixth Circuit Court of Appeals has been placed in the U.S. Mail for delivery to:

Robert H. Watson
WATSON, HOLLOW & REEVES
Suite 1700 First Tennessee Plaza
800 S. Gay Street
Knoxville, TN 37929
(423) 522-3803

W. Mitchell Cramer
WIMBERLY, LAWSON, NORTON & LUHN
Suite 900 Nationsbank Center
550 Main Avenue
Knoxville, TN 37902
(423) 971-4600

Conrad Finnell
CONRAD FINNELL, P.C. & ASSOCIATES
P.O. Box 1476
217 Broad Street, NW
Cleveland, TN 37364-1476

on this 17 day of 4, 1997.

Clifford Leon Houston

CLIFFORD LEON HOUSTON